

Appeal from a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management, denying a request to reinstate trade and manufacturing site application, F-838.

Reversed.

1. Notice: Generally--Notice: Constructive Notice

The Department has long followed the rule that transmission of a decision to a party's last address of record by certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. A party may defeat application of the rule by showing that the Postal Service failed to follow its established procedures in delivering the decision.

APPEARANCES: Daniel W. Beardsley, Esq., Fairbanks, Alaska, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Rick Lee McMullen, Jr., appeals from a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management (BLM), dated August 29, 1986, denying his request for reinstatement of his application for trade and manufacturing (T&M) site F-838.

This appeal stems from an April 20, 1984, BLM letter notifying McMullen that he must submit a \$3,000 deposit for the estimated costs of a survey of the lands encompassed by the described T&M site application. BLM stated in its letter that a failure to submit the required deposit within 180 days would result in cancellation of the claim and closure of the application proceedings without further notice. The letter was sent by certified mail to McMullen at the following address: "General Delivery, Manley Hot Springs, Alaska 99756." The certified letter was returned to BLM marked "[r]efused" and BLM subsequently closed the T&M site application case file.

On November 26, 1985, McMullen requested that the case be reopened and his application reinstated on the grounds that he did not refuse the certified mail item in question. In denying his request to reinstate the application, BLM stated that, as a matter of law, the unclaimed letter was properly served.

On appeal, McMullen argues that, by marking the certified letter refused and returning it to BLM without providing him the full 15 days to claim it, as U.S. Postal Service procedures generally allow, the post office failed to properly present the letter for delivery. Therefore, McMullen submits, the Department's service regulations at 43 CFR 1810.2 were not satisfied. Appellant contends he should not bear the consequences for the post office's failure to perform its duties.

The question presented for decision is whether McMullen had constructive notice of the requirement to tender a deposit for survey costs. We think not.

The rules governing constructive service are provided by both regulation and Board decisions. See J-O'B Operating Co., 97 IBLA 89 (1987). The applicable regulation, 43 CFR 1810.2(b), provides as follows:

Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. An offer of delivery which cannot be consummated at the last address of record because the addressee had moved therefrom without leaving a forwarding address or because delivery was refused or because no such address exists will meet requirements of this section where the attempt to deliver is substantiated by post office authorities.

The Board has held that in accordance with this regulation, when BLM sends a notice or decision, return receipt requested, to a party's last address of record and it is delivered, it is deemed received by the addressee on the service date stated on the return receipt regardless of whether it was in fact received by the addressee. See Lawrence E. Welsh, Jr., 91 IBLA 324 (1986). Under those circumstances where delivery is unsuccessful, the Board has held that, pursuant to the regulation, BLM is deemed to have met its obligation to notify the party when it sends a notice or decision, return receipt requested, to a party's last address of record and it is returned by the postal service because there is no forwarding address, or delivery is refused, or no such address exists. See J-O'B Operating Co., 97 IBLA at 92. Sometimes described as implicit in the regulation and sometimes as a separate rule, the Department has long followed the general rule that transmission of a decision to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. Victor M. Onet, Jr., 81 IBLA 144, 146 n.2 (1984), and cases cited; John Oakason, 13 IBLA 99, 102 (1973). In such a case, the imputed date of service is the date the item is received back by BLM. Michele M. Dawursk, 71 IBLA 343, 347 (1983).

Application of the constructive service rule described above is based upon two assumptions: First, that BLM's decision was sent to the party's last address of record, and second, that the Postal Service properly performed its duties. John H. Blackwood, 89 IBLA 379, 381 n.1 (1985). It is therefore incumbent on BLM to check its files to verify that the address to which the item was sent was correct. Stephen C. Ritchie, 81 IBLA 162, 165 (1984). There is no contention in the instant situation that the address employed was improper.

In light of the second assumption, a party may defeat application of the constructive service rule by showing error in Postal Service procedure in transmitting the decision. Terry L. Wilson, 85 IBLA 206, 211, 92 I.D. 109, 112 (1985). We find there was a departure from prescribed postal procedures in McMullen's case which precludes the application of the constructive service rule.

The record shows that the envelope containing the April 20, 1984, letter, certified mail article #81474, was returned to BLM with the Postal Service-attached notice that it was "[r]efused." Because of that notation, it was not improper for BLM to proceed under the assumption that constructive service had been accomplished. However, when McMullen requested BLM to reinstate his T&M application, he also requested the Postal Service to explain exactly what happened when it returned certified letter #81474. Robert E. Lee, Jr., Postmaster, Manley Hot Springs, Alaska, provided the following statement, dated June 11, 1986:

Mr. Rick McMullen requested that I check my records for May 1984 and inform you of the reason the above numbered certified letter [#81474] was returned marked refused.

During the period in question Mr. McMullen was not coming into Manley to pick up his mail. Robert Blessing was picking it up for him.

Blessing would not sign for a certified letter and as McMullen would not be in Manley during the 15 day period that we are allowed to retain certified mail before returning to sender, it was returned marked refused.

My records do not reflect who the sender was, but the letter was returned to Box 1150, Fairbanks, Alaska.

The letter should have been marked unclaimed instead of refused, as Mr. McMullen did not actually refuse it himself.

The Board has taken official notice in the past of relevant Postal Service regulations requiring notice of the certified mail to be left if the certified letter cannot be delivered for any reason. See Brooks Griggs, 51 IBLA 232, 87 I.D. 612 (1980). A letter which is not deliverable is to be held at the post office. If the letter is not called for within 5 days, a second notice is to be issued. If the letter is not called for or redelivery

requested after the second notice, it is to be returned to the sender at the expiration of the period stated by sender or after 15 days if no period is stated. See Domestic Mail Manual 912.55. Here, the evidence supports the conclusion that the certified letter to McMullen was not held for the mandatory 15 days. Under these circumstances, the constructive service provision of 43 CFR 1810.2 cannot be invoked. See Terry L. Wilson, 85 IBLA at 211, 92 I.D. at 112; L. Lee Horschman, 74 IBLA 360 (1983). Moreover, BLM, and not the intended recipient of the certified letter, should bear the consequences of a failure of the post office to follow established procedures. Id.

In light of the above, the post office should have held certified mail article #81474 for the full period specified in the Postal Service regulations and manuals. It should not have sent the certified letter back marked "[r]efused." While appellant has not affirmatively averred that he would have picked up the certified letter timely had the post office held it for 15 days, whether he would have or not is irrelevant when determining whether the conditions for establishing constructive service were satisfied.

As noted, where the Postal Service has failed to perform its duties, constructive service cannot be imputed to the intended recipient of official correspondence when nondelivery occurs. Accordingly, BLM improperly denied appellant's request to reinstate his T&M site application after it was presented with the postmaster's admission that the Manley Hot Springs post office had erred in its handling of certified mail article #81474 in that it failed to follow its own procedures. Rather, BLM should have recognized constructive service of its letter could not be attributed to McMullen under the circumstances, reinstated his application, and provided him again with the opportunity to tender the required deposit as outlined in the April 20, 1984, letter. That is the course of action which should be followed now.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the August 29, 1986, decision appealed from is reversed.

Wm. Philip Horton
Chief Administrative Judge

I concur:

Will A. Irwin
Administrative Judge